UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 3, 2011

CBCA 2362

MERCHANTS AUTOMOTIVE GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Gary J. Singer, Chairman of the Board of Merchants Automotive Group, Inc., Hooksett, NH, appearing for Appellant.

Audrey H. Liebross, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

SHERIDAN, Board Judge.

This dispute involves a purchase order for the lease of two 2011 Chevrolet Suburban automobiles issued by the Federal Emergency Management Agency (FEMA) to Merchants Automotive Group, Inc. (Merchants) through a GSA E-Buy. Merchants seeks additional annual rent of $15,588, alleging it based its quoted price of $15,588 per year on a per vehicle basis and FEMA leased two vehicles. The appellant elected to have this appeal processed under Board Rule 52, Small Claims Procedure, requiring a decision on the appeal within 120 calendar days from receipt of the election. Under the small claims procedure "[t]he presiding judge may issue a decision, which may be in summary form, orally or in writing. . . . A decision shall be final and conclusive and shall not be set aside except in the case of fraud. A decision shall have no value as precedent." 48 CFR 6101.52 (2011). The parties also elected to have this appeal processed under Board Rule 19, Submission on the Record Without a Hearing, and have each submitted briefs and relevant documents which have been admitted into the record. 48 CFR 6101.19.

Background

In August 2010, FEMA advertised on GSA E-Buy for the lease of two 2011 Chevrolet Suburban 1500 LT 4x4s, or an equal product. The advertisement stated "FEMA has a requirement to lease two (2) SUVs for 36 months," and then set forth the required specifications.

Prior to award, various questions were asked and answered via email between Merchants and FEMA personnel. In some of those email messages FEMA referred to the vehicles that became the subject of this dispute in the singular, e.g., "Is there a navigational system in the vehicle?" In other questions the vehicles were referred to in the plural, e.g., "Also advise if you have the trucks in our preferred color of taupe gray metallic." Most of Merchants' answers were framed in the plural, e.g., "No the Suburbans do not have navigation . . . no reverse warning on these vehicles . . . delivery of both vehicles would be to DC."

Of the nine companies that FEMA invited to submit quotes, three, including Merchants' Automotive Group, did so. Merchants quoted $1299 per month for a per annum price of $15,588 issued for the base year, plus the same amount for the two option years. Acme, the second low quoter, submitted a price of $1570 for two vehicles. Jefferson Leasing (Bancorp) submitted a quote of $784 per month which, through email messages, FEMA realized was a per vehicle price. To analyze its ranking, FEMA doubled Jefferson's quote to $1568 per month.

Merchants' price constituted the low quote, which FEMA accepted by purchase order HSFEHQ-10-F-1118 issued to Merchants on August 19, 2010. The purchase order provided for the "[l]ease of 2 each 2011 Chevy Suburban 1500 LT 4x4," for $15,558. "The total value of this order if all options are exercised is $46,764.00 for 36 months."

After Merchants delivered the vehicles on September 9, 2010, it billed FEMA for $1299 per vehicle per month. Upon receiving the first payment Merchants realized that FEMA was paying it $1299 per month for two vehicles. On September 29, 2010, Merchants called FEMA to discuss a possible modification to establish $1299 as the per vehicle price. According to Merchants, its E-Buy quoted price of $1299 was a per vehicle price.

When the contracting officer refused to issue a modification, Merchants submitted a claim on March 8, 2011, seeking an additional $15,588 annual lease amount for the second vehicle. The contracting officer denied the claim on March 16, 2011, although she offered to pay an additional $3227 per year per vehicle for the base and two option years. This

would have brought Merchants' payment up to the amount that would have been paid to the next low bidder.

Merchants timely appealed the contracting officer's final decision to the Civilian Board of Contract Appeals, where it was docketed as CBCA 2362.

Discussion

This appeal must be decided in accordance with the mistaken offer rules contained in the Federal Acquisition Regulation (FAR). In pertinent part, FAR 14.407-4 provides that a mistake in a contractor's bid not discovered until after award may be corrected if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications. If the contract is reformed to increase the price, the upward adjustment may not exceed that of the next lowest acceptable bid under the original invitation for bids. The contract may be reformed only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was mutual, or if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake. 48 CFR 14.407-4(a)-(b).

There is no evidence in the record that this was a mutual mistake. Merchants has not alleged mutual mistake. Therefore, the appeal must be analyzed as a unilateral mistake. To obtain post-award reformation relief from a unilateral mistake, the mistake must be a clear cut clerical or arithmetic error, or a misreading of specifications, and not a mistake in judgment. *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983); *Aydin Corp. v. United States*, 669 F.2d 681 (Ct. Cl. 1982). In addition, the bidder must establish that the Government either knew or should have known of the mistake at the time the offer was accepted. *Bromley Contracting Co. v. United States*, 794 F.2d 669 (Fed. Cir. 1986); *Wender Presses, Inc. v. United States*, 343 F.2d 961 (Ct. Cl. 1965).

Appellant has provided no evidence to support relief from the terms of this contract based on unilateral mistake. Its quote did not involve a clerical or arithmetic error and there is no indication that FEMA should have known of appellant's mistake. The E-Buy advertisement and resultant purchase order clearly stated that FEMA's requirement was to lease two SUVs for thirty-six months. The undisputed record discloses nothing more than a unilateral error of judgment, which arose out of appellant's own unfounded assumption that the procurement was being made on a per vehicle basis. In such instances no relief is appropriate. *See Satyadev Duggirala v. General Services Administration*, CBCA 463, 07-1 BCA ¶ 33,489, at 165,999 (citing *McClure Electrical Constructors v. Dalton*, 132 F.3d 709 (Fed. Cir. 1997)). There is no evidence that the contracting officer should have realized that Merchants believed that the procurement was being made on a per vehicle basis.

Other than inferring it is entitled to the requested $15,558 per year because its quoted price was based on one vehicle, Merchants has made no arguments that it is entitled to relief. Even if we accepted that Merchants based its quote on a per vehicle basis, we see no evidence that Merchants' mistake falls within the criteria that would allow for the relief it has requested.

Decision

The appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge